

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

CHARLES BROWN, Individually and On  
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

BIOGEN IDEC INC., et al.,

Defendants.

Civil Action No. 05-10400-RCL

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CARY GRILL, Individually and On Behalf of  
All Others Similarly Situated,

Plaintiff,

vs.

BIOGEN IDEC INC., et al.,

Defendants.

Civil Action No. 05-10453-RCL

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[Caption continued on following page.]

ASSENTED TO MOTION BY THE LONDON PENSIONS FUND AUTHORITY AND  
NATIONAL ELEVATOR INDUSTRY PENSION FUND FOR LEAVE TO FILE REPLY  
MEMORANDUM IN RESPONSE TO BIOGEN INSTITUTIONAL INVESTOR GROUP'S  
MEMORANDUM IN OPPOSITION TO THEIR MOTION FOR APPOINTMENT AS LEAD  
PLAINTIFFS AND FOR APPROVAL OF THEIR SELECTION OF LEAD AND LIAISON  
COUNSEL

ROCHELLE LOBEL, Individually and On  
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

BIOGEN IDEC INC., et al.,

Defendants.

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Civil Action No. 05-10801-RCL

Pursuant to Local Rule 7.1(B)(3), class members The London Pensions Fund Authority and National Elevator Industry Pension Fund, hereby move this Court for leave to file a reply memorandum in response to the Biogen Institutional Investor Group's memorandum in opposition to their motion for appointment as lead plaintiffs and approval of their selection of lead and liaison counsel. Counsel for the parties have conferred and counsel for the Biogen Institutional Investor Group have assented to the relief requested in this motion.

DATED: June 1, 2005

Respectfully submitted,

**/s/Theodore M. Hess-Mahan**

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[Proposed] Lead Counsel for Plaintiffs

**LOCAL RULE 7.1(A)(2) CERTIFICATION**

I hereby certify that the parties' counsel have conferred in a good faith effort to narrow or resolve the issues raised in this motion. Counsel for the Biogen Institutional Investor Group have assented to the relief requested in this motion.

**/s/Theodore M. Hess-Mahan**

Theodore M. Hess-Mahan

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CHARLES BROWN, Individually and On	)	Civil Action No. 05-10400-RCL
Behalf of All Others Similarly Situated,	)	
	)	<u>CLASS ACTION</u>
Plaintiff,	)	
	)	
vs.	)	
	)	
BIOGEN IDEC INC., et al.,	)	
	)	
Defendants.	)	
	)	
<hr/>	)	
CARY GRILL, Individually and On Behalf of	)	Civil Action No. 05-10453-RCL
All Others Similarly Situated,	)	
	)	<u>CLASS ACTION</u>
Plaintiff,	)	
	)	
vs.	)	
	)	
BIOGEN IDEC INC., et al.,	)	
	)	
Defendants.	)	
	)	

[Caption continued on following page.]

LONDON PENSIONS FUND/NATIONAL ELEVATOR'S REPLY MEMORANDUM IN  
RESPONSE TO BIOGEN INSTITUTIONAL INVESTOR GROUP'S MEMORANDUM IN  
OPPOSITION TO THEIR MOTION FOR APPOINTMENT AS LEAD PLAINTIFFS AND  
FOR APPROVAL OF THEIR SELECTION OF LEAD AND LIAISON COUNSEL

ROCHELLE LOBEL, Individually and On  
Behalf of All Others Similarly Situated,

Plaintiff,

VS.

BIOGEN IDEC INC., et al.,

Defendants.

Civil Action No. 05-10801-RCL

CLASS ACTION

Institutional Investors The London Pensions Fund Authority and National Elevator Industry Pension Fund (“London Pensions Fund/National Elevator”) respectfully submit this reply memorandum in response to Biogen Institutional Investor Group’s memorandum in opposition to their motion for appointment as lead plaintiffs and for approval of their selection of lead and liaison counsel.

## **I. PRELIMINARY STATEMENT**

Of the four motions that were originally filed seeking appointment as Lead Plaintiff and approval of their respective selection of Lead and Liaison Counsel, only two movants have continued to pursue their motions by filing memoranda opposing the competing motions: (1) London Pensions Fund/National Elevator; and (2) the Biogen Institutional Investor Group.

In opposing the motion of the Biogen Institutional Investor Group, London Pensions Fund/National Elevator raised serious concerns about the Biogen Institutional Investor Group’s financial interest in this litigation and its ability to adequately represent the interests of the rest of the Class. Specifically, London Pensions Fund/National Elevator questioned whether Third Millennium Trading LLP (“Third Millennium”), which represents the bulk of the Biogen Institutional Investor Group’s claimed financial interest: (i) had provided all of the details of its transactions in Biogen IDEC securities during the Class Period; (ii) had even suffered a loss at all on its trading of Biogen IDEC securities; (iii) was an adequate lead plaintiff because of its status as an options trader; (iv) was an adequate lead plaintiff because of its status as a market maker; and (v) suffered from an irreconcilable conflict of interest because of its proprietary relationship with Merrill Lynch, one of Biogen IDEC’s underwriters. Despite repeated requests for more information on these issues, these questions remain unanswered.

Additionally, the Biogen Institutional Investor Group’s recent submission of the certification of Horatio Capital LLC (“Horatio”) with its opposition memorandum is excessively tardy and raises

new issues about its claimed losses and adequacy to serve as lead plaintiff and, if allowed, will likely delay the proper consideration of all of these motions. *See In re Vaxgen Sec. Litig.*, C 03-1129 JSW, *slip op.* at \*7-\*8 (N.D. Cal. Apr. 14, 2004) (attached as Exhibit to Declaration of Nancy Freeman Gans, dated May 16, 2005) (finding that assertion of a financial interest for the first time in an opposition brief should not be allowed because it “invited additional rounds of replies and sur-replies up to and even following the Hearing on the underlying motions”).

By contrast, in Biogen Institutional Investor Group’s memorandum in opposition, it claimed that London Pensions Fund/National Elevator’s motion should be rejected simply because the Biogen Institutional Investor Group claimed to represent a larger financial interest. As previously explained, however, this is not the case. Rather, London Pensions Fund/National Elevator represents the largest financial interest of all *bona fide* movants.

Knowing that London Pensions Fund/National Elevator had already raised legitimate concerns about its claimed financial interest, *see* Letter from Samuel H. Rudman to counsel for the Biogen Institutional Investor Group (attached as Exhibit B to the Hess-Mahan Decl. in Further Support, previously filed on May 16, 2005), the Biogen Institutional Investor Group, on the last page of their brief, claimed that London Pensions Fund/National Elevator’s motion should be stricken as untimely because it was filed 19 minutes past the deadline set forth in the Court’s Electronic Case Filing Administrative Procedures. As set forth in detail herein, and as demonstrated by the Reply Declaration of Theodore M. Hess-Mahan, London Pensions Fund/National Elevator’s motion was time-stamped at 6:01 p.m. EST (or 7:01 p.m. DST). In truth and in fact, it was therefore only delayed by a mere 60 seconds. Moreover, this slight delay, as explained herein, was due to an unforeseen technical error which has not prejudiced any of the parties in this case. *See e.g. In re Peregrine Sys.*, 314 B.R. 31, 40 n.12 (Bank. D. Del. 2004) (“The Notices of Electronic Filing

establish that at most the affidavits were [electronically] filed one hour and one minute late. There is no prejudice to AA WPG and its request [to strike] is denied”).

Accordingly, for these reasons and as set forth in its previous submissions, the London Pensions Fund/National Elevator’s motion should be granted in all respects.

## II. ARGUMENT

### A. London Pensions Fund/National Elevator Represents the Largest Financial Interest of All *Bona Fide* Movants

Despite the claims to the contrary advanced by the Biogen Institutional Investor Group in its memorandum in opposition, London Pensions Fund/National Elevator represents the largest financial interest of all *bona fide* movants seeking appointment as lead plaintiff here. Indeed, the losses of London Pensions Fund/National Elevator are approximately \$3.75 million, significantly greater than the Biogen Institutional Investor Group’s losses of only \$1.3779 million. *See* London Pensions Fund/National Elevator Opp. at 5.<sup>1</sup>

Moreover, despite repeated requests for additional information about the trading details of Third Millennium and concerns about its status as a market maker and an options trader, no information has been forthcoming. Indeed, based on the available information that has been provided by Third Millennium, it is impossible to determine if Third Millennium, which represents the bulk of the Biogen Institutional Investor Group’s claimed financial interest, lost *any money at all* on its trading of Biogen IDEC securities. *See* London Pensions Fund/National Elevator Opp. at 8-9.

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<sup>1</sup> References to “London Pensions Fund/National Elevator Opp. at \_\_\_\_” are to the Memorandum In Further Support Of The Motion Of The London Pensions Fund Authority And National Elevator Industry Pension Fund For Consolidation, Appointment As Lead Plaintiff And For Approval Of Selection Of Lead And Liaison Counsel And In Opposition To The Competing Motions, dated May 16, 2005.

Accordingly, since the losses of Millennium Trading cannot properly be included as part of the Biogen Institutional Investor Group's motion at this point, and for the reasons previously set forth in London Pensions Fund/National Elevators' earlier submissions, the Biogen Institutional Investor Group does not have the largest financial interest in this litigation – London Pensions Fund/National Elevator does.

**B. Horatio's Motion Should Be Denied**

As previously explained, Horatio's failure to file any supporting data for its transactions in Biogen IDEC securities in a timely manner should disqualify it from seeking appointment as a lead plaintiff here. *See* London Pensions Fund/National Elevators Opp. at 11.

Moreover, the signatory of Horatio's certification is Jeffrey Wolfson, who appears to be the Vice Chairman of Pax Clearing Corporation (*see* Exhibit B to the Reply Declaration of Theodore Hess-Mahan), which as previously stated, is now owned by Merrill Lynch, one of Biogen IDEC's underwriters. *See* London Pensions Fund/National Elevator Opp. at 14-15 (discussing a possible conflict of interest based on Third Millennium's relationship with Pax Clearing Corporation and Merrill Lynch). This certainly raises issues about possible conflicts of interest if Mr. Wolfson and/or Third Millennium were to be appointed to represent the class here. *See id.* Additionally, since Mr. Wolfson's prior experience at Pax involved clearing for options traders, it is probable that Horatio has also engaged in options trades which have not been disclosed. *See id.* at 8-11 (discussing significance of omitted trade information in calculating a movant's financial interest). Accordingly, until such information is provided, it is impossible to determine if Horatio has any loss at all on its trades of Biogen IDEC securities.

Nevertheless, even if the Court were to include the tardy and questionable submission of Horatio, which we respectfully submit it should not, the losses of the Biogen Institutional Investor Group are still significantly smaller than the losses of London Pensions Fund/National Elevator.

**C. London Pensions Fund/National Elevator's Motion Was in the Court Prior to the Deadline**

**1. The Motion was Time-Stamped at 6:01 EST**

While the Biogen Institutional Investor Group claims that London Pensions Fund/National Elevator's motion was filed 19 minutes late, in reality it was only filed 60 seconds late, with supporting documentation following shortly thereafter. Indeed, counsel for London Pensions Fund/National Elevator logged onto the Court's website prior to 6:00 p.m. EST, as required by the administrative procedures.<sup>2</sup> This is the equivalent of walking into the Clerk of the Court's office prior to the closing deadline. After selecting the appropriate document description and uploading the pleadings, at least one minute had passed, so that the actual filing was not completed until 6:01 p.m. EST (or 7:01 p.m. DST). *See* Exhibit C the Reply Declaration of Theodore Hess-Mahan, dated June 1, 2005 (stating that "The following transaction [London Pensions Fund/National Elevator's motion] was entered on 5/2/05 at 7:01 PM" DST). Moreover, as explained below, the lateness of the filing was the result of an unforeseen technical delay caused by local counsel's computer virus protection service.<sup>3</sup>

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<sup>2</sup> The Administrative Procedures provide that all filings should be completed by 6:00 p.m. EST in order to be considered filed on that same day. As the Biogen Institutional Investor Group has already pointed out, as of the date of the filing of the motions in this action, the clocks had already been adjusted to Daylight Savings Time ("DST"). Accordingly, the 6:00 p.m. EST deadline is the same as 7:00 p.m. DST.

<sup>3</sup> In any event, many courts, under appropriate circumstances, have considered motions seeking appointment of lead plaintiff that have been filed after the 60-day deadline has passed. *See Coopersmith v. Lehman Bros.*, 344 F. Supp. 2d 783, 790 (D. Mass. 2004) ("The PSLRA does not limit lead plaintiffs to those who have filed motions within 60 days of the publication of the notice.").

For example, in *Coopersmith*, Magistrate Judge Dein concluded that the 60-day deadline is not appropriately enforced in every case. Indeed, Magistrate Judge Dein reasoned that "the fact that the appointment of lead plaintiff is not to be made until after rulings are made on motions to

**2. Any Delay in the Filing Is the Result of An Unforeseen Technical Error**

As explained in the Reply Declaration of Theodore Hess-Mahan, filed herewith, the only reason that London Pensions Fund/National Elevator's motion was filed one minute after the 6:00 p.m. EST deadline is because of a technical problem with counsel's email. Specifically, Kelly Stadelmann, a paralegal at Lerach Coughlin, proposed lead counsel for London Pensions Fund/National Elevator, emailed a copy of the motion and supporting papers to Theodore M. Hess-Mahan, proposed liaison counsel for London Pensions Fund/National Elevator, 43 minutes prior to the filing deadline. As can be seen from Exhibit A to the Reply Declaration of Theodore Hess-Mahan, anti-virus software on Mr. Hess-Mahan's computer detected a possible virus in one of the email attachments included in Ms. Stadelmann's email. As a result of this detection, Mr. Hess-Mahan was forced to go to a password-protected website to retrieve the attachments (which it turned out did not contain any viruses). This process caused the delay which resulted in the filing of the motion at 6:01 p.m. EST.

**3. No Party Has Been Prejudiced By the Filing of London Pensions Fund/National Elevators' Motion 60 Seconds Past the Deadline**

No one has been or will be prejudiced by the 60-second delay in the filing of London Pensions Fund/National Elevators' motion for appointment of lead plaintiff. Indeed, the lone case relied on by the Biogen Institutional Investor Group to argue that "all motions for lead plaintiff must be filed within sixty days of the published notice for the first-filed action" is *In re Vaxgen Securities*

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consolidate is further evidence that the requirement of filing a motion for appointment as lead plaintiff within 60 days of the initial notice is not sacrosanct." 344 F. Supp. 2d at 791; *see also Slutsky v. Endocare*, No. 02-8429, *slip op.* (N.D. Cal. Feb. 10, 2003) (attached as Exhibit D to the Reply Declaration of Theodore M. Hess-Mahan, dated June 1, 2005).

*Litigation*, 03-1129 JSW. Biogen Inst. Inv. Opp. at 8.<sup>4</sup> However, the reason for the deadline, as stated by the court in *Vaxgen*, “is to ensure that the lead plaintiff is appointed at the earliest possible time and to expedite the lead plaintiff process.” *Vaxgen* at \*4. Filing of a motion *a mere sixty seconds* after the 6:00 p.m. EST deadline will certainly have no negative effect on the “expedi[ency]” of the “lead plaintiff process,” especially since every party was served with a copy of the motion in a timely manner. *See e.g. Peregrine Sys.*, 314 B.R. at 40 n.12 (“The Notices of Electronic Filing establish that at most the affidavits were [electronically] filed one hour and one minute late. There is no prejudice to AA WPG and its request [to strike] is denied”).

Similarly, in *Hyperphase Technologies, LLC v. Microsoft Corporation*, 02-C-647-C, *slip op.* (W.D. Wash. July 1, 2003) (attached as Exhibit E to the Reply Declaration of Theodore Hess-Mahan, dated June 1, 2005), the court was confronted with a motion to strike after a movant, Microsoft Corp., filed a motion for summary judgment which, together with its supporting documentation, was electronically filed 4 minutes and 27 minutes and 71 minutes and 15 seconds, respectively, past the midnight filing deadline. In agreeing to “transcend the affront and forgive the tardiness,” the court denied the motion to strike and further stated that “to demonstrate the evenhandedness of its magnanimity, the court will allow Hyperphase on some future occasion in this case to e-file a motion four minutes and thirty seconds late, with supporting documents to follow up to seventy-two minutes later.” *Id.* at \*2.<sup>5</sup>

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<sup>4</sup> References to “Biogen Inst. Inv. Opp. at \_\_\_\_” are to the Memorandum of Law in Further Support of the Motion of the Biogen Institutional Investor Group For Consolidation, Appointment as Lead Plaintiff, and Approval of Lead Plaintiff’s Selection of Co-Lead Counsel and Liaison Counsel and In Opposition to the Other Competing Motions, dated May 16, 2005.

<sup>5</sup> Moreover, the “rule” imposing the 6:00 p.m. EDT deadline is not a rule but rather an “administrative procedure.” *See e.g. Endocare*, No. 02-8429 at \*17 (holding that a movant’s filing for lead plaintiff which failed to comply with the formal requirements of the local rules was still

Moreover, a careful reading of the *Vaxgen* opinion lends further support to the argument previously advanced in London Pensions Fund/National Elevator's motion that the Biogen Institutional Investor Group's belated filing of Horatio's certification is improper. *See* London Pensions Fund/National Elevator Opp. at 11. Indeed, the court in *Vaxgen* specifically states that it is ***improper to assert a financial interest for the first time*** after the sixty day deadline had passed:

“The plain language of the statute precludes consideration of a financial interest asserted for the first time in a complaint, or any other pleading, for that matter, filed after the sixty (60) day window has closed.”

*Id.*, quoting *In re Telxon Corp. Sec. Litig.*, 67 F. Supp. 2d 803, 818 (N.D. Ohio 1999). *See also* *Endocare*, No. 02-8429 at \*16 (“In other cases barring the motions, the district court reasoned that the PSLRA imposes strict time requirements to ensure that the lead plaintiff is appointed at the earliest possible time and to expedite the lead plaintiff process . . . . Here, consideration of the Massachusetts Group's motion does not hinder the lead plaintiff process; all motions are being heard at the same time”).

While no one has been prejudiced in any way by London Pensions Fund/National Elevator's motion being filed one minute late, not the same can be said for the certification and loss chart which was filed by Horatio ***more than 2 weeks after the 60-day deadline had passed***. Indeed, by filing its certification and underlying transactional data for the first time with the submission of its opposition memorandum, Horatio has “asserted” its financial interest “for the first time . . . after the sixty (60) day window has closed.” *Id.* Such conduct is the real and only problem with a filing after the 60-

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considered to be timely filed). Indeed, the Court here has already allowed the motions of Louisiana School Employees' Retirement System and Municipal Police Employees' Retirement System of Louisiana and Rochelle Lobel, which failed to comply with a local rule at the time they were filed, to be re-filed past the 60-day deadline. *See* Docket Entry 5/3/05 (denying motions without prejudice because they “failed to comply with Local Rule 7.1”); and docket entry 26 on 5/13/05 (previously-denied motion was re-filed).

day deadline and is what can delay the lead plaintiff from being “appointed at the earliest possible time.” *Id.* Indeed, the arguments raised herein against Horatio were raised for the first time after counsel had an opportunity to review Horatio’s certification, which had only recently been filed as part of the Biogen Institutional Investor Group’s opposition. Horatio will now likely seek leave to respond to the arguments that were raised against it, further delaying any resolution of these motions. For this reason alone, its motion should be denied. *See Vaxgen*, C 03-1129 JSW, *slip op.* at \*7-\*8 (finding that assertion of a financial interest for the first time in an opposition brief should not be allowed because it “invited additional rounds of replies and sur-replies up to and even following the Hearing on the underlying motions”).

### III. CONCLUSION

For all the foregoing reasons, London Pensions Fund/National Elevator respectfully requests that the Court: (i) appoint them as Lead Plaintiffs in the related Actions; (ii) approve their selection of Lerach Coughlin Stoia Geller Rudman & Robbins LLP as Lead Counsel and Shapiro Haber & Urmey LLP as Liaison Counsel; and (iii) grant such other relief as the Court may deem just and proper.

DATED: June 1, 2005

SHAPIRO HABER & URMAY LLP

/s/ Theodore Hess-Mahan  
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[Proposed] Lead Counsel for Plaintiffs

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CHARLES BROWN, Individually and On	)	Civil Action No. 05-10400-RCL
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vs.	)	
	)	
BIOGEN IDEC INC., et al.,	)	
	)	
Defendants.	)	
	)	
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[Caption continued on following page.]

REPLY DECLARATION OF THEODORE M. HESS-MAHAN IN FURTHER  
SUPPORT OF THE REPLY MEMORANDUM IN RESPONSE TO BIOGEN  
INSTITUTIONAL INVESTOR GROUP'S MEMORANDUM IN OPPOSITION TO THEIR  
MOTION FOR APPOINTMENT AS LEAD PLAINTIFFS AND FOR APPROVAL OF THEIR  
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ROCHELLE LOBEL, Individually and On  
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Defendants.

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) Civil Action No. 05-10801-RCL

)  
) CLASS ACTION

Theodore M. Hess-Mahan, declares, under penalty of perjury:

1. I am an associate at Shapiro Haber & Urmy LLP (“Shapiro Haber”), proposed liaison counsel for London Pensions Fund/ National Elevators. I submit this Reply Declaration in further support of London Pensions Fund/ National Elevators’ response to Biogen Institutional Investor Group’s memorandum in opposition to their motion for appointment as lead plaintiffs and for approval of their selection of lead and liaison counsel.

2. On May 2, 2005, at approximately 6:17 p.m. Eastern Daylight Time [“EDT”] (i.e., 5:17 p.m. Eastern Standard Time [“EST”]), I received an email from Shapiro Haber’s virus protection service regarding an email from Kelly Stadelmann, a paralegal at Lerach Coughlin Stoia Geller Rudman & Robbins LLP, proposed lead counsel for London Pensions Fund/National Elevator, which contained a copy of the documents to be filed for London Pensions Fund/National Elevator’s motion. The email from the virus protection service alerted me that it had detected a possible virus in one of the attachments included in Ms. Stadelmann’s email. Following receipt of this message (a true and accurate copy of which is attached hereto as Exhibit A), I was required to go to a password-protected website to retrieve the attachments (which it turned out did not contain any viruses). This process caused the delay which resulted in the filing of the motion at 7:01 p.m. EDT (6:01 p.m. EST).

3. Attached hereto as Exhibit B is a true and accurate copy of the printout of the webpage [http://www.sff-law.com/why\\_sff.html](http://www.sff-law.com/why_sff.html), which describes Jeffrey Wolfson as the Vice Chairman of Pax Clearing Corporation.

4. Attached hereto as Exhibit C is a true and accurate copy of an email confirming the filing of London Pensions Fund/National Elevators’ motion for appointment as lead plaintiff at 6:01

p.m. EST and 7:01 EDT (stating that “The following transaction [London Pensions Fund/National Elevator’s motion] was entered on 5/2/05 at 7:01 PM”).

5. Attached hereto as Exhibit D is a true and accurate copy of the slip opinion in *Slutsky v. Endocare*, No. 02-8429, *slip op.* (N.D. Cal. Feb. 10, 2003).

6. Attached hereto as Exhibit E is a true and accurate copy of the slip opinion in *Hyperphase Technologies, LLC v. Microsoft Corporation*, 02-C-647-C, *slip op.* (W.D. Wash. July 1, 2003).

DATED: June 1, 2005

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/S/ Theodore M. Hess-Mahan  
THEODORE M. HESS-MAHAN

**Ted Hess-Mahan**

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**From:** VP Solutions Inc Support [vince@vpsi.com]  
**Sent:** Monday, May 02, 2005 6:17 PM  
**To:** Ted Hess-Mahan  
**Subject:** VP Solutions Inc Detected Potential Virus

Dear thess-mahan@shulaw.com,

VP Solutions Inc's virus protection service has detected a potential email virus. This suspicious message has been quarantined in your VP Solutions Inc Message Center:






From: "Kelly Stadelmann" <kstadelmann@lerachlaw.com>  
Subject: RE: Biogen  
Virus: AUTH-HTML/ObjData@expl

You can read the message without infecting your computer.  
Click on the link to access your VP Solutions Inc Message Center:

<http://login.postini.com/exec/login?email=thess-mahan@shulaw.com>

Thank You!  
VP Solutions Inc






We value the trust our clients bestow on us.		
		
<b>Sheldon Baskin</b>	<b>Andrew D. Bunta, MD</b>	<b>Norm Katz</b>
<b>Sheldon Baskin and Partners, Real Estate Investment &amp; Development</b>	<b>Vice Chairman, Dept. of Orthopaedic Surgery, Northwestern Medical Faculty Fdtn.</b>	<b>President Everest Partners LLC</b>
Our association began more than 19 years ago. We have worked together extensively and intensively on the most complex matters. Their creativity and enthusiasm are unsurpassed. They have been responsive and effective under all circumstances and they have always been fair with us.	At a time of significant change in my professional life, Sugar, Friedberg & Felsenthal provided thoughtful and wise counsel on multiple issues. Their personal concern, legal expertise and negotiating skills resulted in a truly seamless transition for me.	We have worked together for almost eight years since we started Everest Partners. I thought it was time to let you know how instrumental you have been in the success of our business. In thinking about this letter I took an inventory of the number of lawyers from your firm I have used in various transactions and believe it or not... <a href="#">Continued...</a>
		
<b>Ulrich Meyer</b>	<b>Kurt Walsh &amp; Renee Betzelos</b>	<b>Charles M. Friend</b>
<b>Chairman Bubbleland Inc.</b>	<b>ProTen Realty</b>	<b>President C.P.A., CF &amp; Associates</b>
SFF represented our prior business and helped us in a very successful sale. They helped us in all the formative stages of our new business including financing. We have worked with them for more than 17 years now and never make a major move without consulting them.	Sugar, Friedberg & Felsenthal helped us launch ProTen Realty Group. They have given us outstanding advice. They continue to protect our interests and assist us with growth. They are the best of the best!	Sugar, Friedberg & Felsenthal provides sound tax advice that harmonizes with my business objectives.
		
<b>Gary A. Rosenberg</b>	<b>Gregory Kay</b>	<b>Jeffrey Wolfson</b>

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<b>President and CEO Canterbury Development Corporation</b>	<b>CEO of TL Galleries, Inc. Lightology LLC</b>	<b>Vice Chairman, Pax Clearing Corporation</b>
Thank you for 22 years of great service. The value of your service immeasurably exceeds its cost with your well-grounded solutions and creativity.	We have relied on SFF over the years to analyze our issues on a strict cost/benefit basis. They have counseled us in reaching our business goals, and then helped us reach those goals with personal attention like no other law firm.	SFF is an outstanding law firm. They've always been there when I've needed them. They have been totally dedicated to my needs and those of my business. The firm understands both business strategies and personal issues. They've accommodated all of my legal needs, from the most simple partnership and real estate transactions to the sale of complex businesses.
		
<b>Harold E. Foreman Jr.</b>	<b>Gagerman Family</b>	<b>W. P. O'Brien Howard K. Chapman R. K. Weil</b>
<b>Private Investor</b>	<b>Jerome Gagerman</b>	<b>H. Kramer &amp; Company</b>
I have used Sugar, Friedberg & Felsenthal as my personal attorneys since they opened their doors over 20 years ago. I have the highest regard for them both as lawyers and as persons.	My family has trusted our personal affairs to Sugar, Friedberg & Felsenthal for three generations. We have relied on them for the most complicated and challenging legal matters, which they have always handled with ease, efficiency and timelessness. We look forward to SFF counseling a fourth generation as well.	At SFF it's the people. Law is law; some understand better than others; it's the people. When legal questions interrupt your daily routine and you need reliable and insightful thought, it's the people. We have been associated with SFF long enough to know we want to stay, it's the people.
<b>Additional Comments</b>		
<b>Les Rosenthal</b>		
<b>Managing Member Rosenthal Collins Group</b>		
I have used Sugar, Friedberg & Felsenthal for my tax and estate planning matters for more than 20 years. They are bright, creative and attentive. Above all else, they really understand the law and my needs as a client.		
<b>Estelle Blaseos</b>		
<b>Board Member and Secretary/Treasurer Cancer Comfort Foundation</b>		
One of the dreams of my brother was to establish a foundation to help alleviate the anxiety, suffering and isolation that cancer patients experience. My brother was an extraordinary businessman who came to rely on Sugar, Friedberg & Felsenthal for counsel during his successful career in the food manufacturing business. When my brother died, SFF helped us realize my brother's dream by doing the legal work to establish the Cancer Comfort Foundation. We appreciate the attention, care and proficiency which SFF showed in helping us organize and launch the Cancer Comfort Foundation.		
<b>James R. Eldridge</b>		
<b>Chairman and CEO The Allant Group</b>		

I was reflecting recently on our long-time association, and realized that I had never formally acknowledged the contribution you and your colleagues have made to the success story that is The Allant Group. So let me make up for that oversight by letting you know how much I value the counsel your firm has provided over these many years. The expertise of your firm has allowed us to successfully traverse some very delicate legal straits in the past, and enabled us to avoid some of those snares altogether. As the owner of a firm that has built a reputation as a premier service provider in our industry, I recognize responsive service when I'm the recipient, and Sugar, Friedberg and Felsenthal has always worked quickly and competently to address our legal needs.

Please pass along my thanks to your colleagues. They have played no small role in my business affairs, and I am greatly appreciative of their efforts on Allant's behalf.

<b>Midwest Young Artists</b>		
<b>Dr. Allan W. Dennis Executive Director</b>		

We are deeply grateful to Sugar, Friedberg & Felsenthal for all they have done to make the programs of the Midwest Young Artists the Midwest leading youth music program, a success. We relied on SFF to work with the U.S. Department of Education, the Department of Defense, the builder, and local municipalities, in order to acquire and rehabilitate the real estate that became our rehearsal facility. It was a long and tedious six year process which could never have been successfully accomplished without the legal help of SFF. We came to admire the negotiating skills, as well as the litigation experience of the law firm. As a result of their accomplishments, we now have a home which accommodates more than 500 students, affording us to reach out to many more youngsters, and presenting a musical opportunity to youngsters like none they can get elsewhere.

<b>Philip L. Kianka</b>		
<b>Vice President Lexington Corporate Properties Trust</b>		

Sugar, Friedberg & Felsenthal represented us in our Kmart bankruptcy lease claims concerning a warehouse/distribution property held in our portfolio. Their commitment to providing us with the best possible advice regarding our claim was one of the best investments we have ever secured. The attention and promptness to details plus the understanding of ownership's concerns involving the matter were absolutely outstanding. We could not have been more pleased with their efforts.

<b>Norm Katz (Cont.)</b>		
<b>President Everest Partners LLC</b>		

almost half the firm has played key roles in our complex deals. Whether the services have been real estate, tax, corporate or litigation, each member of your firm adds unique capacities and knowledge that have served me and my partners very well.

Knowing that you treated our transactions with the intensity and connectedness of an owner and that the deal's success was viewed by you as your responsibility always gave me the confidence that solutions could and would be found to some very thorny transaction issues. Lenders have great confidence in the competence of the firm and that has meant a lot in the heat of battle. There is no way to quantify the value of your services but I hope the fact that we continue to use you exclusively is an indication of the value we place on the relationship.

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**Ted Hess-Mahan**

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**From:** ECFnotice@mad.uscourts.gov  
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**Subject:** Activity in Case 1:05-cv-10400-RCL Brown v. Biogen Idec Inc. et al "Motion to Consolidate Cases"

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United States District Court  
District of Massachusetts

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Case Name: Brown v. Biogen Idec Inc. et al

Case Number: 1:05-cv-10400 <https://ecf.mad.uscourts.gov/cgi-bin/DktRpt.pl?96779>

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Docket Text:

MOTION to Consolidate Cases <I> and for Appointment as Lead Plaintiffs and for Approval of Selection of Lead and Liaison Counsel</I> by London Pensions Fund Authority, National Elevator Industry Pension Fund. (Attachments: # (1) Text of Proposed Order Proposed Order) (Hess-Mahan, Theodore)

The following document(s) are associated with this transaction:

Document description: Main Document

Original filename: yes

Electronic document Stamp:

[STAMP dcecfStamp\_ID=1029851931 [Date=5/2/2005] [FileNumber=957536-0]  
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3172a827a59195da862f53ff2ecf2e97131f5eb]]

Document description: Text of Proposed Order Proposed Order

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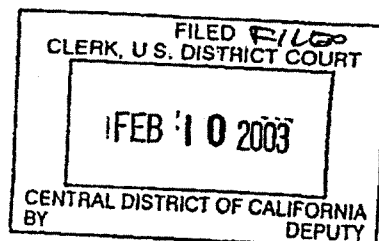
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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

GARY M. SLUTSKY and STACEY G.  
SLUTSKY, On Behalf of Themselves  
and All Others Similarly Situated,

Plaintiffs,

vs.

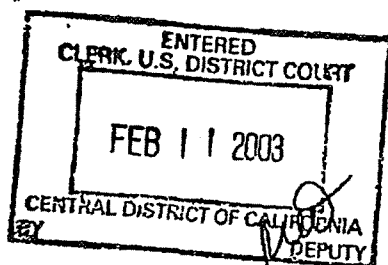
ENDOCARE, INC., PAUL MIKUS and  
JOHN V. CRACCHIOLO,

Defendants.

CASE NO. CV 02-8429 DT (CTx) ✓

ORDER:

- (1) GRANTING PLAINTIFFS MASSACHUSETTS STATE FUNDS AND BILL AND JAYNI CROW'S MOTION TO BE APPOINTED AS LEAD PLAINTIFF AND TO APPROVE LEAD PLAINTIFFS' CHOICE OF COUNSEL AND TO CONSOLIDATE RELATED ACTIONS
- (2) DENYING PLAINTIFF THE GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT'S MOTION TO BE APPOINTED LEAD PLAINTIFF AND TO APPROVE LEAD PLAINTIFF'S CHOICE OF COUNSEL AND GRANTING MOTION TO CONSOLIDATE RELATED ACTIONS
- (3) DENYING PLAINTIFFS OSCAR GONZALEZ AND PRESIDENTS TRUST LLC'S MOTION TO BE APPOINTED AS LEAD PLAINTIFFS AND FOR APPROVAL OF THEIR SELECTION OF LEAD COUNSEL AND GRANTING MOTION TO CONSOLIDATE RELATED CASES
- (4) DENYING PLAINTIFF JERRY WRIGHT'S MOTION FOR APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF HIS SELECTION OF COUNSEL AND GRANTING MOTION FOR CONSOLIDATION OF RELATED CASES
- (5) GRANTING PLAINTIFFS BARBARA AND ROBERT BEUERLEIN'S MOTION TO CONSOLIDATE RELATED ACTIONS



THIS CONSTITUTES NOTICE OF ENTRY  
AS REQUIRED BY FRCP, RULE 77(d).

CONSOLIDATED WITH: CV 02-8455-1  
CV 02-8905-DT, CV 02-9669-DT,  
CV 03-499-DT, CV 03-598-DT,  
AND CV 03-922-DT

1 **I. Background**

2 **A. Factual Summary**

3 Plaintiffs Gary M. Slutsky and Stacey G. Slutsky, on behalf of  
4 themselves and all others similarly situated ("Plaintiffs"), bring this action against  
5 Defendants Endocare, Inc ("Endocare"), Paul Mikus ("Mikus"), and John  
6 Cracchiolo ("Cracchiolo")(collectively "Defendants") for violations of sections  
7 10(b) and 20(a) of the Securities and Exchange Act of 1934 ("Exchange Act") and  
8 Rule 10b-5 promulgated thereunder. (See Complaint, ¶ 5.) They bring this action  
9 on behalf of investors who purchased Endocare Securities on the open market  
10 between October 23, 2001 and October 31, 2002 ("Class Period").

11 The following facts are alleged in the Complaint:

12 Endocare develops, manufactures, and markets cryosurgical and stent  
13 technological devices used in the treatment of prostate cancer and benign prostatic  
14 hyperplasia. (See id. at ¶ 7.) Mikus was Chairman, President and CEO of  
15 Endocare. (See id. at ¶ 8.) Cracchiolo was CFO/COO of Endocare. (See id. at ¶  
16 9.) Mikus and Cracchiolo are the "Individual Defendants" and are allegedly liable  
17 for the false statements pleaded in ¶¶ 12-17 of the Complaint.

18 During the Class Period, Defendants caused Endocare's shares to  
19 trade at artificially inflated levels through the issuance of false and misleading  
20 financial statements. (See id. at ¶ 2.) As a result of the artificial inflation of  
21 Endocare's shares, Endocare was able to complete a public offering of 4 million  
22 shares, raising proceeds of \$68 million on November 16, 2001. (See id.)

23 The false and misleading statements during the Class Period included  
24 press releases on October 23, 2001, February 19, 2002, April 23, 2002, July 24,  
25 2002, October 24, 2002, and October 30, 2002. (See id. at ¶¶ 12-17.)

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1 On October 23, 2001, Endocare issued a press release entitled,  
2 "Endocare Reports Record Third Quarter Revenues Up 139 Percent; Net Loss Cut  
3 by 55 Percent." (See id. at ¶ 12.)

4 On February 19, 2002, Endocare issued a press release entitled  
5 "Endocare Reports Record Fourth Quarter; Year End Results; 106 Percent Growth  
6 in Procedures for Year; Quarter revenues Up 156 Percent; Net Loss Cut by 92  
7 Percent as Company Nears Profitability." (See id. at ¶ 13.)

8 On April 23, 2002, Endocare issued a press release entitled,  
9 "Endocare Reports Results for the First Quarter of 2002; Record Growth, First  
10 Profitable Quarter; Revenues Up 182 Percent from Same Period Last Year,  
11 Procedures Grow 220 Percent Year-Over-Year." (See id. at ¶ 14.)

12 On July 24, 2002, Endocare issued a press release entitled, "Endocare  
13 Reports Second Quarter, Six Months Results; Revenues Up 200 Percent From  
14 Same Period Last Year, Disposable Revenues Grow 250 Percent Year-Over-  
15 Year." (See id. at ¶ 15.)

16 On October 24, 2002, Endocare issued a press release entitled,  
17 "Endocare Comments on Third Quarter 2002 Results; Announces Date of Release  
18 and Conference Call." (See id. at ¶ 16.)

19 On October 30, 2002, Endocare issued a press release entitled,  
20 "Endocare Will Delay Release of Third Quarter Results Until Completion of Its  
21 Review Process." (See id. at ¶ 17.)

22 In order to inflate the price of Endocare's stock and complete the \$68  
23 million secondary offering, Defendants caused Endocare to falsely report its  
24 results for Q3 2001 to Q2 2002 through improper revenue recognition. (See id. at  
25 ¶ 18.) Endocare will have to admit that it inappropriately recorded transactions  
26 included in its Q3 2001 to Q2 2002 results, and will have to restate those results to  
27  
28

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1 remove millions in improperly recorded revenues as the Q3 2001 to Q2 2002  
2 financial statements were not a fair presentation fo Endocare's results and were  
3 presented in violation of Generally Accepted Accounting Principles ("GAAP")  
4 and SEC rules. (See id. at ¶ 20.)

5 Financial statements filed with the SEC which are not prepared in  
6 compliance with GAAP are presumed to be misleading and inaccurate, despite  
7 footnote or other disclosure. (See id. at ¶ 21.) In Endocare's 2001 Form 10-K, it  
8 represented that it recognized revenue in accordance with GAAP. (See id. at ¶  
9 22.) During the Class Period, Endocare improperly recognized revenue in  
10 contravention of GAAP. (See id. at ¶ 24.)

11 On October 30, 2002, Endocare announced its Q3 results would be  
12 delayed when, in actuality, Endocare will need to restate its Q3 2001 to Q2 2002  
13 results to eliminate millions in revenue that had been improperly recorded  
14 revenues and increase its past-stated costs. (See id. at ¶ 25.) The fact that  
15 Endocare will restate its financial statements for those quarters is an admission  
16 that the financial statements originally issued were false and that the overstatement  
17 of revenues and income was material. (See id. at ¶ 26.) The type of restatement  
18 announced by Endocare was to correct for material errors in its previously issued  
19 financial statements. (See id.) GAAP provides that financial statements should  
20 only be restated in limited circumstances, i.e. when there is a change in the  
21 reporting entity, when there is a change in accounting principle or to correct an  
22 error in previously issued financial statements. (See id. at ¶ 26.) As Endocare's  
23 change in reporting is not due to a change in reporting entity or a change in  
24 accounting principle, but was due to errors in previously issued financial  
25 statements, it is an admission by Endocare that its previously issued financial  
26 results and its public statements about those results were false. (See id.)

1 During the class period, Defendants disseminated or approved the  
2 false statements specified above, which they knew or recklessly disregarded were  
3 materially false and misleading in that they contained material misrepresentations  
4 and failed to disclose material facts necessary in order to make the statements  
5 made not misleading in light of the circumstances under which they were made.  
6 (See id. at ¶ 30.) Defendants violated § 10(b) of the 1934 Act and Rule 10b-5 in  
7 that they:

- 8 (a) employed devices, schemes, and artifices to defraud;
- 9 (b) made untrue statements of material facts or omitted to state material  
10 facts necessary in order to make the statements made, in light of the  
11 circumstances under which they were made, not misleading; or
- 12 (c) engaged in acts, practices, and a course of business that operated as a  
13 fraud or deceit upon plaintiffs and other similarly situated in  
14 connection with their purchases of Endocare publicly traded  
15 securities during the Class Period.

16 (See id. at ¶ 31.)

17 The executive officers of Endocare prepared or were responsible for  
18 preparing, Endocare's press releases and SEC filings. (See id. at ¶ 35.) The  
19 Individual Defendants controlled other employees of Endocare. (See id.)  
20 Endocare controlled the Individual Defendants and each of its officers, executives,  
21 and all other employees. (See id.) By reason of such conduct, Defendants are  
22 liable pursuant to § 20(a) of the 1934 Act. (See id.)

23 Plaintiffs bring this action as a class action. The members of the  
24 Class are so numerous that joinder of all members is impracticable. (See id. at ¶  
25 37.) During the Class Period, Endocare had more than 24 million shares of stock  
26 outstanding, owned by thousands of persons. (See id.) There is a well defined

1 On January 2, 2003, Plaintiff Jerry Wright ("Wright") filed a Motion  
2 for Appointment as Lead Plaintiff, Approval of His Selection of Counsel, and  
3 Consolidation of Related Cases. This Motion is presently before the Court.

4 On January 2, 2003, Oscar Gonzalez ("Gonzalez") and Presidents  
5 Trust LLC ("Presidents Trust") (collectively the "Presidents Trust Group"), filed a  
6 Motion to Consolidate Related Cases, Be Appointed as Lead Plaintiffs, and For  
7 Approval of Their Selection of Lead Counsel. This Motion is presently before the  
8 Court.

9 On January 2, 2003, the General Retirement System of the City of  
10 Detroit ("Detroit General") filed a Motion to Consolidate all Related Actions, to  
11 be Appointed Lead Plaintiff Pursuant to § 21D(a)(3)(B) of the Securities  
12 Exchange Act of 1934, and to Approve Lead Plaintiff's Choice of Counsel. This  
13 Motion is presently before the Court.

14 On January 2, 2003 Barbara D. and Robert P. Beuerlein (the  
15 "Beuerleins") filed a Motion to Consolidate Related Actions for All Purposes and  
16 a Motion for Appointment to Lead Plaintiff and for Appointment of Lead Counsel  
17 Pursuant to § 21D(a)(3)(B) of the Securities Exchange Act of 1934. The Motion  
18 to Consolidate all Related Actions is presently before the Court.

19 On January 7, 2003, the Beuerleins filed a Notice of Withdrawal of its  
20 Motion for Appointment to Lead Plaintiff and for Appointment of Lead Counsel  
21 Pursuant to § 21D(a)(3)(B) of the Securities Exchange Act of 1934. They claim  
22 that withdrawal was appropriate because the Massachusetts Group has the largest  
23 financial interest of all movants seeking appointment to lead plaintiff.

24 On January 7, 2003, Massachusetts State Funds and Bill and Jayni  
25 Crow (the "Massachusetts Group") filed a Motion to Appoint them as Lead  
26 Plaintiff and to Approve Lead Plaintiffs' Choice of Counsel and a Motion to  
27  
28

1 Consolidate Related Actions and Preserve Documents. These Motions are  
2 presently before the Court.

3 On January 27, Detroit General filed an Opposition to Motions by  
4 Other Plaintiffs for Appointment as Lead Plaintiff.

5 On January 27, 2003, the Massachusetts Group filed an Opposition to  
6 Competing Motions for Lead Plaintiff.

7 On January 27, 2003 Defendants filed a Response and Opposition to  
8 Motions for Appointment of Lead Plaintiff, Selection of Lead Plaintiffs' Counsel,  
9 Consolidation, and Document Preservation Order.

10 On February 6, 2003, less than 2 court days before the hearing on  
11 these motions, counsel for Detroit General notified this Court that it would be  
12 filing a notice of withdrawal of its motions. At that time, this Order had already  
13 been prepared based on the completed briefing schedule. This Court expended  
14 considerable time and expended judicial resources in fully analyzing and  
15 addressing the arguments raised by Detroit General, as it was one of only two  
16 moving parties which filed oppositions. Detroit General's belated withdrawal  
17 undermines the credibility of its position taken in its briefs and calls into question  
18 the veracity of its counsel and simply confirms this Court's determination that  
19 Detroit General should not be appointed the most adequate lead plaintiff with  
20 approval of its choice of counsel.

## 21 **II. Motions to Consolidate Related Cases**

### 22 **A. Standard**

23 Consolidation is controlled by Rule 42(a) of the Federal Rules of  
24 Civil Procedure<sup>1</sup> and is proper when the actions involve common questions of law  
25

---

26 <sup>1</sup>Rule 42(a) permits the consolidation of separate actions:

27 When actions involving a common question of law or fact are  
28

1 community of interest in the questions of law and fact involved in this case. (See  
2 id. at ¶ 38.) Questions of law and fact common to members of the Class which  
3 predominate over questions which may affect individual Class members include:

- 4 (a) whether the 1934 Act was violated by Defendants;
- 5 (b) whether the Defendants omitted and/ or misrepresented material facts;
- 6 (c) whether Defendants' statements omitted material facts necessary to  
7 make the statements made, in light of the circumstances under which  
8 they were made, not misleading; and
- 9 (d) whether Defendants knew or recklessly disregarded that their  
10 statements were false and misleading.

11 (See id. at ¶ 38.)

12 Plaintiffs and the class have suffered damages in that, in reliance on  
13 the integrity of the market, they paid artificially inflated prices for Endocare  
14 publicly traded securities. (See id. at ¶ 32.) Plaintiffs and the class would not  
15 have purchased Endocare publicly traded securities at the prices they paid, or at  
16 all, if they had been aware that the market prices had been artificially and falsely  
17 inflated by the Defendants' misleading statements. (See id.) As a direct and  
18 proximate cause of the Defendants' wrongful conduct, Plaintiffs and the class have  
19 suffered damages in connection with their purchases of Endocare publicly traded  
20 securities during the Class Period. (See id. at ¶ 33.)

21 Plaintiffs pray for judgment as follows: declaring this action to be a  
22 proper class action; awarding damages, including interest; and such other relief as  
23 the Court may deem proper. (See id. at p. 14.)

24 **B. Procedural History**

25 On November 11, 2002, Plaintiffs filed a Class Action Complaint for  
26 Violation of the Federal Securities Laws and a Demand for Jury Trial.

and fact. See Yousefi v. Lockheed Martin Corp., 70 F. Supp. 2d 1061, 1064 (C.D. Cal. 1999); Aronson v. McKesson HBOC, Inc., 79 F. Supp. 1146, 1150 (N.D. Cal. 1999); In re Equity Funding Corp. of Am. Sec. Litig., 416 F. Supp. 161, 175 (C.D. Cal. 1976). The Court has broad discretion under Rule 42(a) to consolidate cases pending within its District. Investors Research Co. v. United States District Court, 877 F.2d 777 (9th Cir. 1989). Class action shareholder suits are ideal for consolidation because expediting the proceedings reduces duplication and minimized the expenditure of resources. See In re Equity Funding, 416 F. Supp at 176.

#### B. Analysis

Seven cases have been filed alleging claims for violations of sections 10(b) and 20(a) of the Exchange Act, and Rule 10b-5 promulgated thereunder, on behalf of investors who purchased Endocare Securities. The first case, Slutsky, was assigned to this Court, and the remaining cases have been transferred to this Court as related cases. They are as follows<sup>2</sup>:

- |  |                        |
|--|------------------------|
| (1) <u>Slutsky v. Endocare, Inc. et al.</u>  | Case No. CV 02-8429 DT |
| (2) <u>Ferrari v. Endocare, Inc. et al.</u>  | Case No. CV 02-8455 DT |
| (3) <u>Bradford v. Endocare, Inc. et al.</u> | Case No. CV 02-8905 DT |
| (4) <u>Kuper v. Endocare, Inc. et al.</u>    | Case No. CV 02-9669 DT |

pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

<sup>2</sup> Four of these cases - Desert Orchid Partners, Berman, Kuper and Bolton - were transferred from the Southern District and received new case numbers upon transfer.

1 (5) Desert Orchid Partners v. Endocare, Inc. et al. Case No. CV 03-499 DT

2 (6) Berman v. Endocare, Inc. et al. Case No. CV 03-598 DT

3 (7) Bolton v. Mikus, et al. Case No. CV 03-922 DT

4 It is undisputed that these cases involve the same subject matter and  
5 present substantially the same legal issues. Questions of law and fact are  
6 undoubtedly common in each case. Indeed, each case alleges the same violation  
7 of the Exchange Act against Endocare and certain officers and/or directors.<sup>3</sup> As  
8 such, consolidation will promote efficiency, simplify pretrial matters and reduce  
9 confusion. Therefore, this Court finds that consolidation of these related cases is  
10 warranted and grants all moving plaintiffs' motions to consolidate.

11 The above-referenced cases will proceed under the lowest number  
12 case, which is Slutsky v. Endocare, et al., Case No. CV 02-8429 DT. The caption  
13 of each document shall maintain the Slutsky caption and should provide:

14 Case No. CV 02-8429 DT (CTX)

15 Consolidated with: CV 02-8455 DT, CV 02-8905 DT, CV 02-9669 DT, CV  
16 03-499 DT, CV 03-598 DT, CV 03-922 DT<sup>4</sup>

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23 <sup>3</sup> All of the actions except the Bolton action allege the same Class Period.

24 <sup>4</sup> It is not necessary for the filed documents to specify which case it "relates  
25 to", because, as explained below, an amended consolidated class action complaint  
26 will be filed and every document thereafter will be filed under the lowest case  
27 number.

1 **III. Motions for Appointment of Lead Plaintiff and Approval of Lead**  
2 **Counsel**

3 **A. Standard**

4 **1. Appointment of Lead Plaintiff**

5 The procedure for appointing lead plaintiff in a private action arising  
6 under the Exchange Act and brought as a plaintiff class action is established in the  
7 Private Securities Litigation Reform Act of 1995 ("PSLRA"). See 15 U.S.C. §§  
8 78u-4(a)(1), 78u-4(a)(3)(B)(ii). The plaintiff filing the initial action must publish  
9 notice informing class members of their right to file a motion for appointment to  
10 lead plaintiff within 20 days of filing the original complaint. See id. at § 78u-  
11 4(a)(3)(A)(i). Within 60 days of the publication of the notice, any person who is a  
12 member of the proposed class may apply to the Court for appointment to lead  
13 plaintiff. See id. at §§ 78u-4(a)(3)(A), 78u-4(a)(3)(B). The court shall consider  
14 any motions brought by plaintiffs or purported class members to appoint lead  
15 plaintiff and will appoint the "most adequate plaintiff" to serve as lead plaintiff.  
16 See id. at § 78u-4(a)(3)(B)(iii)(I). In appointing lead plaintiff, "the court shall  
17 adopt a presumption that the most adequate plaintiff in any private action arising  
18 under this title is the person or group of persons that:

- 19 (aa) has either filed the complaint or made a motion in response to a  
20 notice;  
21 (bb) in the determination of the court, has the largest financial interest in  
22 the relief sought by the class; and  
23 (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules  
24 of Civil Procedure."

25 Id. That presumption can only be rebutted upon proof by a class member that the  
26 presumptively most adequate plaintiff "will not fairly and adequately protect the  
27  
28

1 interests of the class” or “is subject to unique defenses that render such plaintiff  
2 incapable of representing the class.” See id. at § 78u-4(a)(3)(B)(iii)(II).

3 Rule 23 of the Federal Rules of Civil Procedure<sup>6</sup> requires that the  
4 representative’s claim be typical of those in the class and that the representative  
5 will fairly and adequately protect the interests of the class. See In re Cavanaugh,  
6 306 F.3d 726, 730 (9th Cir. 2002). Typicality is satisfied where the named  
7 plaintiff has (1) suffered the same injuries as the absent class members, (2) as a  
8 result of the same course of conduct by the defendants, and (3) his/ her claims are  
9 based upon the same legal issues as the class members. See Hanon v.  
10 Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992); Haley v. Medtronic, Inc.,  
11 169 F.R.D. 643, 649 (C.D. Cal. 1994); Schwartz v. Harp, 108 F.R.D. 279, 282  
12 (C.D. Cal. 1985). The typicality requirement does not require that the named  
13 plaintiff “be identically situated with all other class members. It is enough if their  
14 situations involve ‘common issues of law or fact.’” O’Connor v. Boeing North  
15 Am., Inc., 184 F.R.D. 311, 332 (C.D. Cal. 1998). Adequacy of representation  
16 “depends upon the qualifications of counsel for the representatives, an absence of  
17 antagonism, a sharing of interests between representatives and absentees, and the  
18 unlikelihood that the suit is collusive.” Brown v. Ticor Title Ins. Co., 982 F.2d  
19 386, 390 (9th Cir. 1992); see also Crawford v. Honig, 38 F.3d 485, 487 (9th Cir.  
20 1994). This purpose of this requirement is to uncover any conflicts of interest  
21 between named parties and the members of the class they seek to represent. Von

22  
23 <sup>6</sup>Rule 23(a) provides that a party may serve as a class representative if the  
24 following prerequisites are met:

25 (1) that the class is so numerous that joinder of all members is  
26 impracticable, (2) there are questions of law or fact common to the class, (3)  
27 the claims or defenses of the representative parties are typical of the claims  
28 or defenses of the class, and (4) the representative parties will fairly and  
adequately protect the interests of the class.

1 Collin v. County of Ventura, 189 F.R.D. 583, 592 (C.D. Cal. 1992)(quoting  
2 Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 625 (1997)).

3 **2. Approval of Lead Counsel**

4 Under § 21D(a)(3)(B)(v) of the Exchange Act, the lead plaintiff shall,  
5 subject to court approval, select and retain counsel to represent the class. 15  
6 U.S.C. § 78u-4(a)(3)(B)(v). The court should only interfere with the lead  
7 plaintiff's selection of counsel only where it is necessary to "protect the interests  
8 of the class." See id. at § 78u-4(a)(3)(B)(iii)(II)(aa).

9 **B. Analysis**

10 **1. The Massachusetts Group is the most adequate plaintiff**

11 The moving plaintiffs are as follows: (1) Oscar Gonzales and  
12 Presidents Trust, LLC ("the Presidents Trust Group"); (2) Massachusetts State  
13 Guaranteed Annuity Fund, Massachusetts State Carpenters Pension Fund and Bill  
14 and Jayni Crow ("the Massachusetts Group"); (3) Jerry Wright ("Wright"); and (4)  
15 the General Retirement System of the City of Detroit ("Detroit General"). Thus,  
16 these plaintiffs fulfill the first factor of the most adequate plaintiff presumption -  
17 i.e., they have made a motion in response to a notice. The next factor involves  
18 determining who has the largest financial interest in the relief sought by the class.  
19 Under Section 21D(e)(1) of the Exchange Act, the calculated damages for  
20 plaintiffs holding their shares after the end of the class period is "the difference  
21 between the purchase or sale price paid or received . . . and the mean trading price  
22 [of Endocare stock] during the 90-day period beginning on the date on which the  
23 information correcting the misstatement or omission that is the basis for the action  
24 is disseminated to the market." 15 U.S.C. § 78u-4(e)(1). Each of the movants  
25 initially claims that it has the largest financial stake in the relief sought:  
26  
27  
28

1 • The Massachusetts Group represents that it suffered losses of over \$1  
2 million (the Massachusetts State Funds' loss is over \$582,000, and the  
3 Crows' loss is \$510,652)<sup>7</sup>

4 • Detroit General represents that it suffered estimate losses of \$500,000<sup>8</sup>

5 • The Presidents Trust Group represents that it suffered estimated losses of  
6 \$100,409.79<sup>9</sup>

7 • Wright represents that he suffered estimated losses of \$30,172.66<sup>10</sup>

8 Based on the above, then, the moving plaintiff with the largest financial stake is  
9 the Massachusetts Group.<sup>11</sup> None of the other moving plaintiffs disputes this. As  
10 such, at this point, the presumption is that the Massachusetts Group is the most  
11 adequate plaintiff.

12  
13  
14 <sup>7</sup> The Massachusetts Group calculates its losses by multiplying the shares  
15 held at the end of the period from October 23, 2001 to October 30, 2002 (the Class  
16 Period) by the average share price during the 90 days after the Class Period. (See  
17 Seefer Decl., Exh. A.) The Massachusetts Group states that the price used was  
18 \$0.00 because trading in Endocare's stock was halted on December 31, 2002. It  
states that therefore there was no market for Endocare stock on December 31,

19 <sup>8</sup> Detroit General calculates a mean trading price of \$2.97 for Endocare  
20 common stock from October 31, 2002 through December 26, 2002 because 90  
21 days have not passed since September 24, 2002 (the date of the corrective  
disclosure). See Stickney Decl., Exh. D.)

22 <sup>9</sup> The Presidents Trust Group calculates its losses by using a mean trading  
23 price of \$2.97.

24 <sup>10</sup> Wright calculates his loss by using the mean trading price of \$2.97.

25 <sup>11</sup> The Massachusetts Group states that its losses exceed the losses of all the  
26 other movants irrespective of what average share price is utilized. Its losses are  
27 \$878,384 using the \$2.97 mean trading price. (See Greenstein Decl., Exh. 1.)

1 Detroit General opposed the Massachusetts Group's motion. It  
2 argued that while the Massachusetts Group claims a greater aggregated loss than  
3 Detroit General, the Massachusetts Group filed its motion five days after the  
4 statutory deadline, and therefore, the Massachusetts Group should be barred from  
5 consideration as the lead plaintiff. As explained below, this Court disagrees with  
6 Detroit General.

7 On November 1, 2002, the plaintiff in the first-filed action, Slutsky,  
8 published a statutory notice on the Business Wire. (See Exh. B to Stickney Decl.  
9 of Detroit General's Motion.) This notice stated, "If you wish to serve as lead  
10 plaintiff, you must move the Court no later than 60 days from today." Sixty days  
11 from November 1, 2002 was December 31, 2002. Detroit General contends that  
12 because the Intake Section of the District Court was open on a limited basis only  
13 on December 31, 2002 and the next day was New Year's Day, which was a legal  
14 holiday, the statutory deadline to file a lead plaintiff motion was January 2, 2003.<sup>12</sup>  
15 All moving parties except the Massachusetts Group filed their motions on the date  
16 of January 2, 2003. The Massachusetts Group filed its motion on January 7, 2003.

17 The Massachusetts Group responds that its motion was timely filed  
18 on December 31, 2002, when it was received by the Clerk of the Court. It relies  
19 on cases which have held that for purposes of the statute of limitations, a  
20 complaint is regarded as "filed" if it arrives in the custody of the clerk within the  
21  
22

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23 <sup>12</sup> Under Rule 6(a), which governs the computation of time for statutory  
24 deadlines, "the last day of the period . . . shall be included, unless it is a Saturday,  
25 a Sunday or a legal holiday, or, when the act to be done is the filing of a paper in  
26 court, a day on which . . . conditions have made the office of the clerk of the  
27 district court inaccessible, in which event the period runs until the end of the next  
28 day which is not one of the aforementioned days."

1 statutory period but fails to conform with formal requirements in local rules. See  
2 Loya v. Desert Sands Unified School Dist., 721 F.2d 279, 280 (9<sup>th</sup> Cir. 1983).

3 First, this Court clarifies what occurred with the filing of the  
4 Massachusetts Group's motion. On December 31, 2002, the Massachusetts Group  
5 did attempt to file its motion. The Intake Section "received" but did not file the  
6 motion and prepared a Notice of Document Discrepancies wherein it noted that the  
7 timeliness of notice was incorrect. As a result, this Court rejected the motion on  
8 January 2, 2003, and the motion was returned to the Massachusetts Group on  
9 Friday, January 3, 2003. The Massachusetts Group then filed the motion on  
10 January 7, 2003. As such, the Massachusetts Group's motion would have been  
11 filed on December 31, 2002 but for the discrepancy. Detroit General asks this  
12 Court to strictly enforce the 60-day statutory deadline, and it cites other district  
13 court cases which barred motions which were filed after the 60-day statutory  
14 period. However, this Court finds these other non-binding cases unpersuasive  
15 under the circumstances presented here. In the other cases barring the motions,  
16 the district court reasoned that the PSLRA imposes strict time requirements to  
17 ensure that the lead plaintiff is appointed at the earliest possible time and to  
18 expedite the lead plaintiff process. See, e.g., In re Telxon Corp. Sec. Litig., 67 F.  
19 Supp. 2d 803, 819 (N.D. Ohio 1999); Netsky v. Capstead Mortg. Corp., 2000 U.S.  
20 Dist. Lexis 9941, at \* 16 (N.D. Tex. July 12, 2000); In re MicroStrategy Inc. Secs.  
21 Litig., 110 F. Supp. 2d 427, 433 (E.D. Va. 2000). Here, consideration of the  
22 Massachusetts Group's motion does not hinder the lead plaintiff process; all  
23 motions are being heard at the same time.<sup>13</sup>

24  
25  
26 <sup>13</sup> Furthermore, as the Massachusetts Group points out, some of the cases  
27 cited by Detroit General suggest that late filings may be excused.

1 Furthermore, this is not a case wherein the moving plaintiff first  
2 attempted to file the motion after the statutory deadline. As explained above, the  
3 Massachusetts Group attempted to file its motion within the statutory time;  
4 however, non-compliance with a local rule precluded the timely filing. While the  
5 cases relied on by the Massachusetts Group<sup>14</sup> are not directly applicable here, they  
6 are instructive. They hold that a complaint is filed when it is placed in the actual  
7 or constructive custody of the clerk, despite any subsequent rejection of the  
8 pleading for non-compliance with a provision of the local rules. See Loya, 721  
9 F.2d at 280. They reason that to elevate a local rule to the status of a jurisdictional  
10 requirement would conflict with the mandate of the Federal Rule of Civil  
11 Procedure 1 to provide a just and speedy determination of every action. See id. at  
12 280-81. Thus, although these cases explicitly addressed the filing of the  
13 complaint, the Ninth Circuit's observation that local rules serve important interests  
14 but should not be applied as an over-rigorous sanction is important here. See  
15 Loya, 721 F.2d at 281; see also Cinton, 813 F.2d at 920 (noting that "the  
16 consensus" is that all pleadings, and not just the complaint, are considered filed  
17 when they are placed in the possession of the clerk of the court).<sup>15</sup>

18 In sum, then, given the circumstances presented, this Court finds that  
19 the Massachusetts Group's filing of its motion on January 7, 2003 does not  
20 preclude it from consideration as the lead plaintiff. Having properly filed a motion  
21 and having the greatest financial interest, the Massachusetts Group remains the  
22 presumptively most adequate plaintiff. The next question is whether the

23  
24 <sup>14</sup> Loya, 721 F.2d 279, United States v. Dae Rim Fishery Co., Ltd., 794 F.2d  
25 1392 (9<sup>th</sup> Cir. 1986), and Cinton v. Union Pacific R. Co., 813 F.2d 917 (9<sup>th</sup> Cir.  
1987).

26 <sup>15</sup> This Court notes that it is not making any blanket finding that failure to  
27 comply with the local rules should be excused.

1 Massachusetts Group satisfies the requirements of Rule 23 - typicality and  
2 adequacy of representation.

3 This Court finds that the Massachusetts Group has shown that it  
4 meets the requirements of Rule 23. The Massachusetts Group asserts claims that  
5 are typical of the claims of the members of the proposed class. It alleges that  
6 Defendants violated the Exchange Act by publicly disseminating materially false  
7 and misleading statements about Endocare during the Class Period. It alleges that  
8 it acquired Endocare securities at prices artificially inflated by Defendants'  
9 fraudulent misrepresentations and omissions and were damaged thereby. Because  
10 its claims are based on the same legal theories and arise "from the same event or  
11 course of conduct giving rise to the claims of other class members," typicality is  
12 satisfied. With respect to adequacy of representation, the Massachusetts Group's  
13 interests are aligned with the members of the proposed class, as it shares  
14 substantially similar questions of law and fact with the members of the proposed  
15 class, and its claims are typical. The Massachusetts Group has submitted sworn  
16 certifications affirming its willingness to serve as, and assume the responsibilities  
17 of lead plaintiff. (See Seefer Decl., Exh. B; Crow Decl.; Harrington Decl.) Based  
18 on the foregoing, and the lack of any challenge by the other movants with respect  
19 to these factors, the Massachusetts Group has satisfied the requirements of Rule  
20 23.

21 Defendants filed a response and limited opposition to these motions.  
22 They claim that they have standing to do so, and the Massachusetts Group argues  
23 that they do not have standing to do so. Obviously, based on the parties' citations,  
24 courts are split as to defendants' standing with respect to lead plaintiff motions.  
25 This Court does not need to discuss its view on this issue at this time since  
26 Defendants admittedly "do not express a view on the merits of the competing lead  
27  
28

1 plaintiff motions.” Rather, Defendants “note” that substantial authority rejects the  
2 appointment of unrelated, lawyer-aggregated parties as lead plaintiff, and they  
3 object to certain proposed scheduling, which this Court addresses later.

4 With respect to aggregation for lead plaintiffs, Defendants rely on  
5 cases which have refused to consider for lead plaintiff a group of individuals  
6 brought together for aggregation. They argue that the Massachusetts Group offers  
7 no evidence that its proposed group is anything other than artificial or are in any  
8 way necessary for appointment. This Court acknowledges that courts are divided  
9 on the question of whether individual losses of unrelated investors may be  
10 aggregated to satisfy the largest financial interest requirement. See In re  
11 Cavanaugh, 306 F.3d 726, 731 (9<sup>th</sup> Cir. 2002). This Court has previously adopted  
12 a “case-by-case approach” which allows it “maximum flexibility to select a lead  
13 plaintiff who will best represent the interests of the class and exercise control of  
14 the litigation.” In re Heritage Bond Litigation, slip op. at 16, attached as Exh. B to  
15 Seefer Suppl. Decl. (quoting In re Versata, 2001 WL 34012374, at \* 5 (N.D. Cal.  
16 Aug. 17, 2001)). Under said approach, a group is permitted to aggregate its losses  
17 and serve as lead plaintiff, regardless of whether a pre-existing relationship  
18 existed, if the characteristics required to adequately represent a class are present in  
19 the group. Here, as explained above, the Massachusetts Group adequately  
20 represents the class, and no party suggests otherwise. It consists of 2 large  
21 sophisticated institutional investors and a married couple, and it asserts that the  
22 institutional investors are the exact type which Congress intended to spearhead  
23 securities class action litigation, and the couple provide an ideal complement and  
24 have a significant financial incentive to prosecute this action. Thus, the  
25 Massachusetts Group is permitted to aggregate its losses and serve as lead  
26 plaintiff.

1                   **2. The Massachusetts Group's counsel is approved**

2                   The Massachusetts Group has selected the law firm of Milberg Weiss  
3 Bershad Hynes & Lerach LLP to represent the class, and it submits the firm's  
4 resume in support of its choice. (See Seefer Decl., Exh. D.) This Court agrees  
5 that Milberg Weiss has extensive experience litigating securities class actions and  
6 has prosecuted numerous securities fraud class actions. As such, this Court  
7 approves the Massachusetts Group's choice of counsel.

8                   **3. Defendants' objections**

9                   Having determined that the Massachusetts Group is the lead plaintiff;  
10 this Court addresses certain provisions in its Proposed Order Consolidating  
11 Related Actions, Preserving Documents, and Setting Briefing Schedule  
12 ("Proposed Order") to which Defendants object.

13                   a. Filing of a consolidated class-action complaint

14                   The Proposed Order proposes that lead plaintiffs be granted 60 days  
15 to file an amended consolidated complaint. Defendants argue that 60 days is too  
16 long and that 30 days should be ample time since plaintiffs have already filed  
17 complaints. The Massachusetts Group responds that it has not filed a complaint  
18 and that other events have occurred since the complaints were filed which need to  
19 be investigated. This Court finds that 60 days is an appropriate amount of time to  
20 allow the Massachusetts Group to fully and adequately prepare an amended  
21 consolidated class action complaint. Thereafter, Defendants shall have 45 days to  
22 respond.

23                   b. Class certification motion

24                   The Proposed Order proposes that the lead plaintiff shall file a motion  
25 for class certification within 30 days after the earlier of (a) the service of  
26 Defendants' answer to the consolidated complaint; or (b) the entry of an order  
27  
28

1 denying Defendants' motion to dismiss. It further proposes that counsel shall  
2 propose to the Court a mutually agreeable schedule for class certification  
3 discovery and for briefing and hearing of such motion. Defendants argue that the  
4 30 days is insufficient because they are entitled to take discovery on the Rule 23  
5 class certification factors. They also argue that this proposal is premature. This  
6 Court agrees with this last argument. A consolidated complaint is to be filed in 60  
7 days, and then Defendants' response is to be filed 45 days thereafter. If  
8 Defendants' response is a motion to dismiss, as they represent it will be, then said  
9 motion is to be briefed and decided. Depending upon the outcome, the parties can  
10 then discuss guidelines and scheduling for a motion for class certification and  
11 related discovery.

12 c. Document preservation

13 The Massachusetts Group also moves for an order regarding  
14 document preservation. In its Proposed Order, it proposes that counsel for the  
15 parties shall notify their clients of their document preservation obligations  
16 pursuant to the federal securities laws. Defendants argue that such a request is  
17 superfluous in light of existing statutes. This Court finds that to the extent that the  
18 Proposed Order purports to alter the obligations created under PSLRA, it is  
19 improper and any language to that effect must be omitted. To the extent that the  
20 Proposed Order restates the obligations created under the PSLRA, it may be  
21 redundant but not improper and therefore allowable.

**C. Conclusion**

Accordingly, this Court:

- **Grants** Plaintiffs Massachusetts State Funds and Bill and Jayni Crow's Motion to Be Appointed as Lead Plaintiff and to Approve Lead Plaintiffs' Choice of Counsel
- **Denies** Plaintiff the General Retirement System of the City of Detroit's Motion to be Appointed Lead Plaintiff and to Approve Lead Plaintiff's Choice of Counsel
- **Denies** Plaintiffs Oscar Gonzalez and Presidents Trust LLC's Motion to Be Appointed as Lead Plaintiffs and for Approval of Their Selection of Lead Counsel
- **Denies** Plaintiff Jerry Wright's Motion for Appointment as Lead Plaintiff and Approval of His Selection of Counsel

This Court orders Lead Plaintiff to file a First Amended Consolidated Class Action Complaint within 60 days of the date of this Order. Defendants shall respond within 45 days from the date of the filing of said complaint.

IT IS SO ORDERED.

DATED: 2/10/03

DICKRAN TEVRIZIAN  
\_\_\_\_\_  
Dickran Tevrizian, Judge  
United States District Court

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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HYPERPHRASE TECHNOLOGIES, LLC  
and HYPERPHRASE INC.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

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ORDER

02-C-647-C

Pursuant to the modified scheduling order, the parties in this case had until June 25, 2003 to file summary judgment motions. Any electronic document may be e-filed until midnight on the due date. In a scandalous affront to this court's deadlines, Microsoft did not file its summary judgment motion until 12:04:27 a.m. on June 26, 2003, with some supporting documents trickling in as late as 1:11:15 a.m. I don't know this personally because I was home sleeping, but that's what the court's computer docketing program says, so I'll accept it as true.

Microsoft's insouciance so flustered Hyperphrase that nine of its attorneys, namely Mark A. Cameli, Lynn M. Stathas, Andrew W. Erlandson, Raymond P. Niro, Paul K. Vickrey, Raymond P. Niro, Jr., Robert Greenspoon, Matthew G. McAndrews, and William W. Flachsbart, promptly filed a motion to strike the summary judgment motion as untimely. Counsel used bolded italics to make their point, a clear sign of grievous iniquity by one's foe.

Copy of this document has been  
provided to: Att Counsel  
BBC  
this 18 day of July 20 03  
by C.A. Kerth  
C.A. Kerth, Secretary to  
Magistrate Judge Crocker

True, this court did enter an order on June 20, 2003 ordering the parties not to flyspeck each other, but how could such an order apply to a motion filed almost five minutes late? Microsoft's temerity was nothing short of a frontal assault on the precept of punctuality so cherished by and vital to this court.

Wounded though this court may be by Microsoft's four minute and twenty-seven second dereliction of duty, it will transcend the affront and forgive the tardiness. Indeed, to demonstrate the even-handedness of its magnanimity, the court will allow Hyperphrase on some future occasion in this case to e-file a motion four minutes and *thirty* seconds late, with supporting documents to follow up to *seventy-two* minutes later.

Having spent more than that amount of time on Hyperphrase's motion, it is now time to move on to the other Gordian problems confronting this court. Plaintiff's motion to strike is denied.

Entered this 1<sup>st</sup> day of July, 2003.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'Stephen L. Crocker', written over a horizontal line.

STEPHEN L. CROCKER  
Magistrate Judge